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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. VICTOR E. MARTINEZ, Defendant and Appellant.	B299347 Los Angeles County Super. Ct. No. NA037529

APPEAL from an order of the Superior Court of Los Angeles County, Laura L. Laesecke, Judge. Affirmed.

Escovar & Avila and Steve Escovar for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Steven D. Matthews and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Victor E. Martinez appeals from the trial court's denial of his motion under Penal Code section 1473.7[1] to vacate his conviction upon his no-contest plea 20 years ago to a violation of Health and Safety Code section 11352, subdivision (a). We find no error and therefore affirm.

FACTS AND PROCEDURAL BACKGROUND

1. *The charges, plea agreement, and immigration advisement*

In 1998 the People charged Martinez with three drug crimes: a violation of Health and Safety Code section 11351 (count 1) and two violations of Health and Safety Code section 11352, subdivision (a) (counts 2 and 3).[2] On August 6, 1998, Martinez entered into a negotiated disposition with the People. Martinez agreed to plead to count 2—a violation of Health and Safety Code section 11352, subdivision (a)—and the prosecution agreed to dismiss the two remaining counts. If convicted of all charges, Martinez could have faced seven years and four months in prison. The agreed-upon disposition, however, was that

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[1] References to statutes are to the Penal Code unless otherwise stated.

[2] The record on appeal does not contain a copy of the felony complaint or the information. It does contain what appears to be a 2017 printout from the Los Angeles Superior Court's website. Nor does the record before us contain any details about the facts of the charged crimes. During the hearing on Martinez's motion, the prosecutor mentioned that Martinez had "made two controlled buys" and police "found more cocaine" when they served a search warrant. The court—that had before it the preliminary hearing transcript—noted Martinez "had 8.14 grams of cocaine."

Martinez would be placed on three years of formal probation and serve 180 days in the county jail.[3]

The deputy district attorney advised Martinez of his rights and the consequences of his plea. Among other consequences, the prosecutor told Martinez, "If you are not a citizen of the United States, you may be deported, denied re-entry into the United States, or denied naturalization pursuant to the laws of the United States." The prosecutor then asked, "Mr. Martinez, do you understand all the consequences of your plea as I have just explained to you?" Martinez answered, "Yes."

The court then stated, "For the record, the defendant is consulting with defense counsel through the interpreter." The court asked Martinez, "The answer to that last question, sir, do you understand the question?" Martinez answered, "Yes." The court said, "Your answer?" Martinez said, "Yes." The court repeated, "Do you understand the consequences?" Again, Martinez answered, "Yes." The court directed the prosecutor to continue. Martinez then pleaded no contest to the charge. In response to further questions from the prosecutor, Martinez confirmed that no one had threatened him or anyone close to him, and that he was pleading freely and voluntarily and because he believed it was in his best interest to do so.

The parties agreed Martinez would be released on his own recognizance pending sentencing. Martinez apparently returned to court in March 1999 for sentencing.

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[3] Although the plea transcript reflects an agreement that Martinez would serve 180 days in the county jail, apparently he served only 26, receiving credit for time served. This may be because—at some point after his arrest—Martinez assisted police, as discussed below.

2. *Martinez's motions to vacate his conviction, the evidentiary hearing, and the trial court's ruling*

More than 18 years later, in May 2017, Martinez filed a motion to vacate his conviction under section 1016.5. In August 2017, Martinez's current counsel substituted into the case. In February 2018, counsel filed a motion to vacate Martinez's conviction under section 1473.7. Martinez contended he "did not meaningfully understand the immigration consequences of his plea." Martinez acknowledged having received the required statutory advisement under section 1016.5, subdivision (a), but he argued he was "led to believe that immigration consequences were within the realm of possibility but not a certainty" because the statute uses the word "may" rather than "will." Martinez stated that, in September 2015, he was "ordered removed to El Salvador."

Martinez's motion to vacate his conviction was continued a number of times over the next year. In January 2019, Martinez filed a "supplement" to his motion. Martinez contended that—instead of pleading to any of the crimes with which he was charged—he could have pled to having been an accessory and to simple possession of narcotics, and completed deferred entry of judgment.

In April 2019 Martinez filed a second supplemental brief, citing *People v. Camacho* (2019) 32 Cal.App.5th 998 (*Camacho*). Martinez again contended that the use of the statutory language —"may"—"fail[ed] to accurately advise Mr. Martinez . . . that his conviction to an offense involving controlled substances would deem him **permanently deported** from the United States."

The evidentiary hearing on Martinez's motions took place on June 18, 2019. Martinez's counsel Steve Escovar called as a witness the attorney who had represented Martinez at the time of his plea, Joe Gualano. Gualano testified he had served as a

deputy public defender for more than 31 years, until he retired from that office in January 2017. Given the passage of 21 years, Gualano said he had "absolutely no independent recollection of this case at all," even though Escovar had shown him the docket and the plea transcript. Gualano had tried to get his file from the public defender's office but "no one could locate it." Gualano had been present in court a couple of weeks earlier and had seen Martinez there; he did not recognize or remember Martinez.

Gualano testified at length about his custom and practice as a court-appointed defense lawyer. If the client spoke Spanish, he "would have had an interpreter" and "would have advised him of all of his rights." At some point—Gualano was not sure if it was before or after 1998—he "changed the wording in [his] advisement" from " 'may be' to 'will be deported, excluded from naturalization, or admission into the United States,' just to make it clear that that will happen." Gualano recalled that a violation of Health and Safety Code section 11352 was a "crime of moral turpitude [that] would get you deported." Whether the client was going to be deported directly from the jail, or whether an out-of-custody client would "walk[ ] out that back door," Gualano told them "exactly what the advisement was."

Escovar stated that Martinez had been "cooperating with law enforcement prior to his plea." Gualano testified he generally advised clients "never" to cooperate with law enforcement but "[i]t was their decision." It was "rare" for Gualano to have a cooperating client. Cooperation could have "some weight" in getting a favorable disposition.

For a client charged with selling or transporting narcotics, Gualano would try to get a dismissal or a misdemeanor, or a simple possession charge with diversion, "even though drug diversion didn't keep them from immigration consequences." If a client didn't have an immigration hold, "the general rule was you

would be released, and if a client was interested in that, then that's what we pursued." Gualano told his clients "you will be deported . . . if you come in contact with the police and they find out about your record and that you're here without papers." Some clients cared more about getting out of jail even if Gualano told them "you will get deported."

Gualano "tried very hard in [his] 31 – ½ years to not recommend that a client take or not take a plea. . . . [His] M.O. was not to tell people to take a plea for any reason. [He] would explain the consequences and let them make the decision." When asked if he ever would tell a client that he would not have any immigration consequences if he cooperated with the police, Gualano answered, "Absolutely not, unless the police, the district attorney, and the court told me that that would be the case." That would have had to be "either in writing or as part of the plea agreement on the record." Gualano remembered only one such case in all his years; it involved the theft of credit cards.[4]

Martinez testified on his own behalf at the hearing. He stated that, after his arrest, a detective came and asked him if he wanted to cooperate. According to Martinez, the detective told

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[4] Martinez states in his brief that Gualano testified "he never told a client with this type of plea that they would be permanently banished from the United States." In fact, Escovar asked Gualano, "You never told the client that they would be permanently banished from the United States in this type of plea; correct?" Gualano answered, "No." In other words, Gualano said that was not correct. Escovar did not inquire further or attempt to clear up any confusion caused by the double negative in his question.

him, "Hey, you cooperate, probably you're going to be deported."[5] However, Martinez then testified, "When I talked to the attorney, he said I won't be deported because I was cooperating already. That court day, I walk out the door, going home."

When asked what the prosecutor told him, Martinez answered, "I'm not going to be deported because I was cooperating. That's what he told me." Escovar reminded Martinez the prosecutor was "the government's attorney," and asked again what the prosecutor had told him. Martinez then said, "I don't remember." After reading the transcript of his plea, Martinez stated the prosecutor had told him, "I may be deported." Martinez testified he talked with his attorney "and he said I won't be deported because I was cooperating."

Escovar asked Martinez, "[W]hat was your understanding of this plea agreement with cooperation with regards to deportation?" Martinez answered, "I won't be deported. I won't have any issues after cooperating. I won't be deported. I'm going to stay here. I'm not going back to my country." Martinez testified he learned there was a problem when he tried to renew his "immigration work permit" and to apply for a green card in about 2010. Martinez stated that, had he known he was going to be deported, he "would have continued to fight the case."

On cross-examination, Martinez testified he had not been concerned about being deported when he was selling drugs. After he was arrested and spent nearly a month in jail, it was "very important" to him to get out of jail to take care of his family. Asked again what the detective told him, Martinez said, "If I want to cooperate, that way he can take me out of jail." Asked

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[5] In his brief, Martinez states his testimony was that the detective said, "[H]ey, you cooperate, probably you're not going to be deported." That is not what the transcript says.

if the detective told him he wouldn't be deported, Martinez answered, "Yes, he told me that." Martinez testified his attorney told him, "That's the best thing to do. You're not going to be deported. You're walking home. You're walking home today." Martinez said he didn't know or remember whether he had an immigration hold. Asked about Gualano, who had just testified, Martinez answered, "I know he was [my attorney], but I don't remember him."

When the prosecutor asked Martinez if he had been "listening in court when the DA told you about your rights," he answered, "I don't remember." The prosecutor asked, "Were you paying attention to what they were saying to you?" Martinez responded, "I guess." Martinez admitted that, when he committed the narcotics offense, he knew he was "here illegally and that [he] could be deported at any time."

In argument, Escovar told the court he had "no intention [of] seeking to establish" ineffective assistance of counsel. Instead, his contention was that Martinez had failed meaningfully to "understand the consequence of the plea."

After hearing argument at some length from both Escovar and the deputy district attorney, the court ruled. The court first noted Martinez was not entitled to relief under section 1016.5 because the plea transcript showed he was advised of the immigration consequences using the required statutory language. The court observed that at that point Martinez "stop[ped] and consult[ed]" with his attorney, using an interpreter.

As for the section 1473.7 motion, the court stated that, in its view, Martinez "was fully aware this was a deportable charge." The court continued, "I think he was making the decision that this was in his best interest because he was getting released, he was cooperating, and that down the line, things would be very advantageous to him in any potential immigration

situation. But I do not believe that he felt he was not going to be deported."

The court stated it was "quite confident that Mr. Gualano advised [Martinez] and, based on [Gualano's] testimony, is saying, 'I would have never told a client that he was not going to be deported.' I think what is clear is that he was saying 'you getting out now helps you from being immediately deported. You walking out the back door helps you from being immediately deported. You cooperating helps you from being immediately deported.' " The court observed that the prosecution's offer of probation and jail time was very attractive in light of Martinez's exposure of more than seven years in the state prison.

The court concluded, "I think the defendant knew what he was doing. He was advised that he could be deported, and he made this choice, and I think probably [it] was his very best decision at the time. But . . . his actions may have consequences." The court then denied Martinez's motions to vacate his conviction.

DISCUSSION

Section 1473.7 allows a noncitizen who pleaded guilty to a crime and was convicted on his plea to move to vacate his conviction if it was legally invalid due to a prejudicial error that damaged the noncitizen's ability meaningfully to understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a guilty or no contest plea. (*People v. Fryhaat* (2019) 35 Cal.App.5th 969, 976; § 1473.7, subd. (a)(1).) The moving party bears the burden to prove by a preponderance of the evidence that he is entitled to relief. (§ 1473.7, subd. (e)(1).) A finding of legal invalidity may—but need not—include a finding of ineffective assistance of counsel. (§ 1473.7, subd. (a)(1).)

Where, as here, the defendant does not contend that his counsel was constitutionally ineffective, but argues only that his plea was legally invalid based on a deprivation of his statutory rights, we review the trial court's denial of the motion for abuse of discretion. (*People v. Vivar* (2019) 43 Cal.App.5th 216, 224, review granted Mar. 25, 2020, S260270 (*Vivar*); *People v. Rodriguez* (2019) 38 Cal.App.5th 971, 977.)

Martinez contends the trial court "failed to review [his] claim for relief under the proper standard of review," citing *Camacho*, *supra*, 32 Cal.App.5th 998, and *People v. Mejia* (2019) 36 Cal.App.5th 859 (*Mejia*). The record does not support that contention. Martinez concedes he was required to prove (1) he did not "meaningfully understand" or "knowingly accept the actual or potential adverse immigration consequences" of the plea (italics omitted); and (2) had he understood the consequences, it is reasonably probable he would have attempted to defend against the charges rather than entering a plea. He notes the key issue is the defendant's "mindset" and what he understood at the time.

This is precisely the analytical framework the trial court followed. The court stated, "I think that the client was fully aware this was a deportable charge." The court said it was "quite confident" that his attorney, Joe Gualano, "advised him," citing Gualano's testimony that he never would have told a client he was not going to be deported. The court "look[ed] [at the situation from] Mr. Martinez's perspective," noting the advantages to him of being released from jail. The court continued, "I think he went into this with his eyes wide open and made that decision knowing that there was a potential risk . . . ." The court concluded, "I think the defendant knew what he was doing. He was advised that he could be deported, and he made this choice . . . ."

As for the second requirement—that Martinez prove it was reasonably probable he would have insisted on going to trial had he understood the immigration consequences—the court noted the prosecution's offer was "fantastic" in light of Martinez's potential exposure of more than seven years in prison. The court observed Martinez had to plead to only one of the three charges. The court agreed with Escovar that Martinez could try a "Hail Mary" at trial but, if he lost, he would have gone to prison and not served his sentence in county jail, as is the case after realignment. The court added, "He automatically, of course, would have been deported, no question. Right then and there, he would have been deported." Being released after only 26 days in jail and cooperating with police might, the court noted, have been advantageous to Martinez "in any potential immigration situation."

As Martinez acknowledges, in cases involving ineffective assistance of counsel claims, the United States Supreme Court has stated " '[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. [Rather, they] should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences.' " (*Vivar*, *supra*, 43 Cal.App.5th at p. 229, quoting *Lee v. United States* (2017) 582 U.S. __ [137 S.Ct. 1958, 1967].) "An allegation that trial counsel failed to properly advise a defendant is meaningless unless there is objective corroborating evidence supporting appellant's claimed failures. . . . [T]he 'easy' claim that counsel gave inaccurate information further requires corroboration and objective evidence because a declaration by defendant is suspect by itself." (*People v. Cruz-Lopez* (2018) 27 Cal.App.5th 212, 223-224.) " 'It is up to the trial court to determine whether the defendant's assertion is credible, and the court may reject an assertion that is not

supported by an explanation or other corroborating circumstances.' " (*Vivar*, at p. 229, quoting *People v. Martinez* (2013) 57 Cal.4th 555, 565.) These legal principles apply with equal force to a claim based on statutory rather than constitutional rights.

Martinez's heavy reliance on *Camacho* and *Mejia* is misplaced. Both cases are distinguishable.

Camacho pled to a felony charge of possessing marijuana for sale. He successfully completed probation, had his conviction expunged, and—after Proposition 64 passed—had the charge reduced to a misdemeanor. (*Camacho*, *supra*, 32 Cal.App.5th at pp. 1000-1001.) In a declaration filed with his section 1473.7 motion as well as at the hearing, Camacho testified "his attorney told him everything would be fine" as far as his immigration status. (*Camacho,* at p. 1001.) Camacho's conversations with his lawyer focused on avoiding jail time, because Camacho "thought that if he received jail time he would be deported." Camacho testified his attorney never told him the charge would subject him to deportation. (*Id*. at p. 1002.)

Camacho's lawyer testified he discussed immigration consequences with all his clients but he didn't remember discussing those consequences with Camacho and he made no notes to that effect in his file, even though it was his custom to make such notes. (*Camacho*, *supra*, 32 Cal.App.5th at p. 1002.)

The trial court denied Camacho's motion, finding it was "premature because no deportation proceedings had been initiated" and Camacho's lawyer was not constitutionally ineffective under *Strickland v. Washington* (1984) 466 U.S. 668. (*Camacho*, *supra*, 32 Cal.App.5th at pp. 1003-1004.)

In reversing the trial court's denial of Camacho's motion, the court of appeal stated, "The trial court made no express or implied credibility determination for or against defendant, as

the ruling was based upon a finding that defendant had not demonstrated ineffective assistance of counsel or prejudice . . . ." (*Camacho*, *supra*, 32 Cal.App.5th at p. 1009.) The court noted Camacho's declaration and testimony "showed not only counsel error, but also included defendant's own error in believing that a negotiated plea calling for no time in custody would avoid making him deportable, and in not knowing that his plea would subject him to mandatory deportation and permanent exclusion from the United States." (*Ibid.*)

Mejia involved similar facts. Mejia had pled guilty to three narcotics crimes. In support of his motion under section 1473.7, Mejia testified his retained counsel " 'hardly spoke to [him] or asked [him] any questions.' " (*Mejia*, *supra*, 36 Cal.App.5th at p. 863.) His lawyer never asked him about his immigration status or explained he'd be deportable if he pled to the charges. Even though Mejia had initialed an immigration advisement on the plea form, he testified his attorney " 'told [him] that [he] had no choice but to take the deal,' " and he should " 'sign all of the boxes on a form and to just do what he told [Mejia] to do once [they] were in court.' " (*Ibid.*) Mejia's lawyer had died in the intervening years and so was not available to testify. (*Ibid.*)

The trial court denied Mejia's motion, stating it was analyzing his claim " 'based on ineffective assistance of counsel.' " The court concluded Mejia had " 'failed to make a sufficient showing that he would have declined the plea and risked going to trial had he been more fully apprised of its immigration consequences.' " (*Mejia*, *supra*, 36 Cal.App.5th at p. 865, italics omitted.)

In reversing the trial court's order, the court of appeal stated that Mejia's testimony at the evidentiary hearing had been "undisputed" and that, "[w]hen ruling on the motion, the trial court made no express or implied credibility determinations on

this point, as the denial was based solely on IAC considerations." (*Mejia*, *supra*, 36 Cal.App.5th at p. 872.)

Here, by contrast, the trial court *did* make credibility determinations. Martinez testified Gualano told him he would not be deported because he was cooperating. But Gualano testified he "[a]bsolutely" would never tell a client he would have no immigration consequences if he cooperated. The court—having observed and listened to both of these witnesses—had to resolve this conflict in the testimony by deciding whom to believe. The court's ruling made clear it believed Gualano. The court was "quite confident" that Gualano had advised Martinez of the immigration consequences; the court credited Gualano's testimony that he never would have told a client he was not going to be deported. While the court did not explicitly say it found Martinez untruthful, that conclusion is implicit in the court's findings that Martinez "was fully aware this was a deportable charge" and that "he went into this with his eyes wide open and made that decision knowing that there was a potential risk." We do not reevaluate witness credibility or reweigh the evidence; rather we defer to the trial court's determinations on credibility. (*People v. Tapia* (2018) 26 Cal.App.5th 942, 953 [trial court "implicitly found" defendant's "self-serving declaration" "not credible"]; *People v. Harris* (2015) 234 Cal.App.4th 671, 695 [reviewing court may not "disturb" the "implied credibility finding[s]" of the trial court].)

In short, the trial court correctly applied the law set forth in section 1473.7 and the governing cases.[6] The court focused on

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[6] *People v. Ruiz* (2020) 49 Cal.App.5th 1061, decided after briefing was complete in this case, does not require a different result. There, the defendant Josefina Ruiz filed a motion to vacate her drug conviction under both sections 1016.5 and

Martinez's "mindset" at the time of his plea—in the words of the *Mejia* court (*Mejia*, *supra*, 36 Cal.App.5th at p. 866)—and what he meaningfully understood at the time. The court referred to what Martinez's counsel told him at the time—finding Gualano credible—because what Martinez's lawyer told him obviously had bearing on his mindset—what he understood when he chose to enter his plea in exchange for probation and a forthwith release from jail. We find no error.

1473.7. The court denied the motion. (*Ruiz*, at p. 1064.) After the Legislature amended section 1473.7, Ruiz filed another motion under that statute. The trial court denied the motion without a hearing, ruling that it "lacked jurisdiction" because the second motion was an "untimely 'motion for reconsideration' " of the earlier motion. (*Ruiz*, at pp. 1064-1068, 1070.) Our colleagues in Division Six reversed, ordering the trial court "to hear and consider Ruiz's motion to vacate her prior conviction on its merits." (*Id*. at p. 1070.) Here, the trial court *did* hear and consider Martinez's motion, taking testimony and making credibility determinations.

DISPOSITION

We affirm the trial court's order denying Victor E. Martinez's motions to vacate his conviction under Penal Code sections 1016.5 and 1473.7.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P. J.

LAVIN, J.